Supreme Court of the United States.

OCTOBER TERM, 1901.

MARTHA J. SWERINGEN,
Plaintiff in Error,

vs.

THE CITY OF ST. LOUIS,
Defendant in Error.

No. 187.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PETITION FOR REHEARING IN BEHALF OF PLAINTIFF IN ERROR AND BRIEF IN SUPPORT THEREOF.

Now comes Martha J. Sweringen, plaintiff in error, and respectively petitions this Honorable Court for a rehearing of the above entitled cause, for the following reasons, to-wit:

1. Because the court, in sustaining the motion to dismiss this cause for want of jurisdiction, on the ground that the decision of the Supreme Court of Missouri herein on the patent under consideration "was not one of 'validity,' but one of fact as to where by the language of the grant was its eastern boundary line," and that the same did not present a federal question, overlooked the marked distinction in

cases of boundary lines, where they present questions of law or fact under the common law or a State law, and are therefore under the exclusive jurisdiction of the State courts to construe and determine, and where they present questions of fact that have been settled by the general government, either by an act of Congress or the Land Department, and are therefore under the ultimate jurisdiction of the general government to construe and determine as matters of law only (Shoshone Mining Co. v. Rutter, 177 U. S. 505, 511), which distinction is firmly established by a long line of decisions of this court. The present case comes directly within the decisions in the cases of Schools v. Risley, 10 Wall. (77 U. S.), 91; County of St. Clair v. Lovingston, 23 Wall. (90 U. S.), 46, and Shively v. Bowlby, 152 U. S. 1, 9, and it involves the validity of the patent relied on in it, and raises a federal question.

2. Because the court overlooked the legal conclusion, established in like manner, that the Land Department, in issuing patents, ascertains all of the facts of boundary and location, by which all courts are bound, and over which they ordinarily have no jurisdiction (Cragin v. Powell, 128 U. S., 691, 699), except on questions of law, and that official United States surveys and the plats attached to them import absolute verity as to the facts shown by them (Bates v. Illinois Central Rd. Co., 1 Black [66 U. S.], 204, 206), the plat of the survey herein showing plainly that there was no land between the meander line of the survey and the river, only a sand bar, plainly marked "MISSISSIPPI RIVER," and which is therefore conclusively a part of the river, and it makes the river the boundary in this patent; Jeffris v. East Omaha Land Co., 134 U. S., 178, 194-196, and that therefore a claim made under it that the title to land is held by virtue of it and the claim denied necessarily involves its validity and presents a federal question.

3. Because this court overlooked the fact that the statements made in the patent under consideration are such as to imperatively require its construction in order to ascertain its boundaries, and therefore a federal question is necessarily presented.

4. Because this court misconstrued the Act of Congress of June 6, 1874, and overlooked the decisions heretofore made by this court, especially Campbell v. Laclede Gas Light Co., 119 U. S., 445, 446, presenting a federal question under it, and others in regard to the manner in which a federal question could be raised under it (Crowell v. Randell, 10 Pet. [35 U. S.], 368, 394), and that under them a federal question is presented herein.

And your petitioner prays that an order may be made for a rehearing of the argument in this case, on a day to be appointed by the court, at such time and upon such points as the court may direct.

G. A. FINKELNBURG,
E. P. JOHNSON,
Attorneys for Plaintiff in Error.

We hereby certify that this petition for a rehearing is presented in good faith, and that we believe it is based on meritorious grounds.

G. A. FINKELNBURG,
E. P. JOHNSON,
Attorneys for Plaintiff in Error.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

The above distinction in regard to boundaries was not specially referred to either in the briefs filed in this case, or in the oral argument of it, but the second proposition in connection with it was silently assumed by the attorneys for plaintiff, (as the conclusion to be arrived at from numerous cases cited by them, none of which, however, specially pointed out this distinction in the opinion in the case.

This distinction arises on French and Spanish grants, either perfect or imperfect, and in some cases of imperfect ones that had been confirmed by the United States. The boundary of a perfect French or Spanish grant is exclusively under the jurisdiction of the French, Spanish or local law, and so are those of imperfect ones, even after confirmation by the United States (unless the confirmation was made with specific boundaries), until an ascertainment or fixing of such boundaries under the authority of the United States, which are usually ascertained or fixed by an official United States survey.

The most satisfactory way in which to present this distinction is believed to be by making concise digests of cases in this court presenting it, sufficient to show how the question arose in them, and by making brief extracts from the opinions on the point, and it is therefore adopted.

Before doing so the attention of this court is called to the fact that the Constitution of the United States vests in Congress the power to dispose of the public domain, and Congress vested this power in the Department of the Interior. This power confers a special jurisdiction of the subject, and its action is binding on the courts, except in cases of fraud, or where the land is not subject to be disposed of. In the latter case the Department is without jurisdiction; United States v. Schurtz, 102 U. S., 378-395;

Cragin v. Powell, 128 U. S., 691-699; Davis's Admr. v. Weibold, 139 U. S., 507-529; Hardin v. Jordan, 140 U. S., 371-400.

In McDonogh v. Millaudon, 3 How. (44 U. S.), 693, on writ of error to the Supreme Court of Louisiana, the plaintiffs in error had filed plans of survey and descriptions of the land with the register and receiver, as part of their title, giving the boundaries as they were claimed before the Supreme Court of Louisiana, and claimed that these were confirmed by Congress. This court decided against the latter contention, holding that said boundaries were not so confirmed, and that their recognition extended only to the boundaries the grants (being perfect Spanish ones) themselves furnished, according to their landmarks, and the construction under the local laws in virtue of which they were obtained, and did not raise a federal question. The opinion then proceeds as follows, on p. 706:

"If the fact assumed was true, that the plans and description had been confirmed, and title given according to them by the United States, then the decision would be opposed to the confirmation, and jurisdiction exist in this court."

The foregoing is directly in point in the case at bar, and in favor of the claim made by plaintiff, that a federal question is presented.

In Mackey v. Dillon, 4 How. (45 U. S.), 421, a private or unofficial survey, fixing boundaries, was read in evidence, and an instruction given treating it as binding on all parties including the United States. In sustaining the jurisdiction of this court on writ of error to the Supreme Court of Missouri, this court first referred to the proposition that the admission of evidence to establish the mere fact of boundary in regard to the extent of a grant cannot raise a federal question, however erroneous the evidence admitted to establish it, and then further said, p. 447:

"But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of State courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed in a similar manner as if a like question had arisen in a supreme court of error of a State, when reversing the proceedings of inferior courts of original jurisdiction,—on this principle we are compelled to act in the present suit, when dealing with the instruction given on behalf of the defendant."

The latter is the opposite of the case at bar, but applies the same principles as the preceding case. The decision of the Supreme Court of Missouri applies the evidence in regard to boundary contained in the patent under consideration, and construes it in such manner as to deprive plaintiff of rights and incidents that she claimed were vested in her by the patent, and the decision impairs its validity to that extent and presents a federal question.

In Doe v. Mobile, 9 How. (50 U. S.), 451, on writ of error to the Supreme Court of Alabama, both sides of the distinction under consideration are passed upon. The plaintiff claimed the piece of land in controversy under a French grant in 1757, confirmed by Act of Congress of May 8, 1822, on which a patent issued in 1837, and the city claimed it under a grant by Act of Congress of May 26, 1824 (4 Stats. at Large 67). The contention was as to the boundary line between the parties, and, looking at the case in its aspect of lines not fixed or sanctioned by the United States, the court held that it furnished no federal question, and that this location would depend on common-law principles, or the peculiar laws of the State, and not on any Acts of Congress or doings of our public officers (p. 467). The plaintiff insisted that when the conflict began, concerning this line and title to this piece of land, the register and receiver, who was authorized

to do so by two Acts of Congress, settled finally, then and forever, both the title and location, including the true boundary of the lot. The State court refused to concur in this contention, and this court held that it overruled the right set up under the supposed decision of those public officers of the United States concerning the title, and presented a federal question, which it reviewed. (p. 468.)

The opinion proceeds further, and leaves no doubt that if said officers had authority to fix the boundary line as contended by plaintiff, and had done so by setting stakes and stones or trees, or some other monument, the decision of the State court against the plaintiff would not only have furnished a federal question but would have necessitated a reversal of its judgment. (468, 469.)

The legal principle here announced is direct authority for the contention of plaintiff in error, and it needs no elaboration in order to apply it to a case like the one at bar, where the construction placed by the Supreme Court of Missouri upon the boundary line of the patent was such as to deprive the plaintiff of the rights she claimed under it, and impair its validity to that extent.

In Maguire v. Tyler, 1 Black (66 U. S.), 195, a Spanish concession had been granted in 1794 to Joseph Brazeau, of 4 arpents in front, on the Mississippi river, by 20 arpents in depth. In 1798 he sold and conveyed the same, excepting a reservation of 4 by 4 arpents on said river front, to Louis A. Labeaume (the patentee in the case at bar), said 4 by 4 arpents being located in the southeast corner of the land embraced in the patent under consideration in this case (and of Soulard's Survey) to said Louis Labeaume or his legal representatives. In 1799, said Louis Labeaume got another Spanish concession enlarging his tract of 4 by 16 arpents, which included the land conveyed to him by Brazeau, extending north to the Rocky Branch, calling for 20 arpents in depth, with an order for a survey, which was

executed by Antoine Soulard, Surveyor General of the Province, in the same year, in such manner as to include within its boundaries the 4 by 4 arpents reserved by Brazeau in his conveyances to Lebeaume; for which survey and plat see Record herein, p. 23. The "Old Board of Commissioners" confirmed these two claims together, 356 arpens to Labeaume and 16 arpents to Brazeau, and ordered surveys to be made and patents to issue accordingly. (Litigation ensued, beginning in this court with the case of West v. Cochran, 17 How. [58 U. S.], 403, next the case under review, and finally the case of Maguire v. Tyler, 8 Wall. [75 U. S.], 650, by which the Brazeau claim was sustained against the judgment of the Supreme Court of Missouri.) In 1817 the surveys ordered were made by Joseph C. Brown, deputy United States surveyor, so as to include both confirmations in one survey, aggregating 360 arpents—equal to 306 1-4 acres. The Recorder of Land Titles refused to issue a patent certificate on this survey, claiming that separate surveys should have been made of the claims of Brazeau and Labeaume, therefore, in 1833, said Brown made another survey of said claims, throwing off a portion on the west of the survey made by him in 1817, leaving the survey of Labeaume's claim otherwise as by the survey of 1817, which included both claims, and locating Brazeau's claim of 4 by 4 arpents on the river, immediately south of the south line of said survey of 1817.

Brazeau's representatives in a contest before the Land Department, claimed the 4 by 4 arpents in the southeast corner of Soulard's Survey, and the Survey of 1817 by Brown, and the Attorney General to the General Land Office, held that Brazeau was entitled to his 4 arpents in the southeast corner of Soulard's Survey of 1799 (being the same as Brown's Survey of 1817) which embraced both Brazeau's and Labeaume's tracts, but the Secretary of the Interior, on appeal, overruled this in 1851, set aside the surveys of Brown of 1817 and 1833, and ordered a survey of the Bra-

zeau claim outside of Labeaume's Survey as made by Soulard, and by Brown in 1817, and locating it as Brown did in 1833, and ordered a retracing of the lines of Soulard's Survey as Labeaume's claim, all of which was done, and resulted in the issue of the patent (see Record herein, p. 14) under consideration, March 25, 1852, in accordance with Soulard's Survey of 1799.

Maguire sued in the State court, which rendered judgment for the defendant, and which was afterwards affirmed by the Supreme Court of Missouri, and he sued out a writ of error to this court. A motion was made to dismiss the cause for want of jurisdiction, which was brought on with the final hearing, and was overruled on the ground that the construction of the Acts of Congress conferring power on the Secretary of the Interior, to do the acts complained of (set aside the surveys), were prominently drawn in question, and that the decision below rejected the title set up by Maguire by maintaining the validity of the secretary's decision, and presented a federal question.

Mr. Chief Justice Taney, with whom concurred Mr. Justice Grier, dissented on the question of jurisdiction, on the ground that the only point in dispute appeared to be upon the true location (boundaries) of the land reserved by Brazeau in his deed to Labeaume, which they contended depended upon the description of it in the deed, and not upon the survey made by the Surveyor General of the United States, and, therefore, no federal question was presented, but as the court took jurisdiction they concurred in affirming the judgment.

The learned dissenting justices overlooked the fact that Brazeau's confirmation of 4 by 4 arpents had been officially surveyed by the United States, and thereby brought the case within the unquestionably correct legal principle in regard to jurisdiction, so learnedly and carefully elaborated by Mr. Justice Catron, in the case of McDonogh v. Millaudon, 3 How. (44 U. S.), 693, 706, and which remains

the law. If there had been no official United States surveys of the Brazeau and Labeaume claims, the dissent undoubtedly embodies the true legal principle and the law of the case.

The judgment in the case is precisely in point in the case at bar, and sustains the jurisdiction herein contended for. To emphasize this conclusion, attention is called to the fact that if the dissent of the truly learned and able chief justice had been adopted in the case by this court, the patent obtained by Brazeau's representatives for his 4 by 4 arpents would have been utterly nullified, and their claim lost. This error on the part of the learned and able dissenting justices recalls to mind the fact that "even Homer nods."

There have been many decisions of this court involving this question since the foregoing, but its jurisdiction in them has seldom been raised by Attorneys or commented on by this court, and always sustained.

The opinion in the case at bar follows the legal doctrine announced in the foregoing dissent, and allows the judgment of the Supreme Court of Missouri to stand, without review, while its opinion holds that the United States Survey contained in the patent "exhibits a tract of fourteen acres or more between the eastern boundary of the survey and the river itself" (Record, p. 293), thus removing the survey line, not only from the river where plaintiff claimed that it was, but far enough west to leave east of the eastern survey line, not only the alluvion formed to the survey (94.16 acres), but also fourteen acres of the land placed inside of the survey line by the express words of the patent (Record, p. 23, at the end of the paragraph entitled "Remarks"), thereby utterly invalidating the title and patent, not only to the alluvion claimed as an incident under it, but also to the fourteen acres of land contained in the survey, through which plaintiff's lots run, and denying plaintiff's title and incident claimed under said patent. On the same principle the court could have removed the line west

so as to have excluded 318 of the 318.16 acres of land contained in the survey, and utterly invalidated the patent as effectually as if it had decided that the patent was illegally issued, and escaped a review by this court of its erroneous ruling on the plea that it was merely passing on a question of boundary instead of a federal question.

There is cited in the opinion dismissing the case at bar Shoshone Mining Co. v. Rutter, 177 U. S. 505, a mining claim case, as an authority against the jurisdiction of this court. It is respectfully submitted that there was a misapprehension by this court in regard to the latter case. There is a very marked and broad distinction, in regard to federal questions, between mining claim cases and patents for agricultural lands, the patent under consideration being of the latter class. The former involve questions of fact, local customs or rules of miners in the several mining districts, when not inconsistent with the laws of the United States, and the statute of limitations of the State or Territory where the same may be situated, none of which are settled by the laws of the United States or any officer or agent thereof before the action is begun. Besides, the statute merely authorizes an action to establish a right and does not create a right to be established (case last cited). On the other hand, the right to the patent under consideration was created by the statute under which it was issued, the means of ascertaining the right to it, with its extent and boundaries, were all provided for by the statute, and ascertained and fixed as therein provided, leaving no fact to be determined, but pure questions of law (the construction of said statute, or which is the same thing, the acts of the officers of the United States under it), in ascertaining whether its eastern boundary was the river, as claimed by plaintiff, which claim the Supreme Court of Missouri decided against plaintiff, clearly denying to her a right claimed under said statute, and presenting a federal question which this court has jurisdiction to review.

The distinction herein contended for is so clearly presented by Mr. Justice Brewer, in his opinion in the latter mining claim case, and the principle on which jurisdiction is acquired by this court in both classes of cases, so learnedly and definitely stated (in strict accordance with the digests of, and extracts from, the cases hereinbefore made), that the paragraph containing it cannot be abridged without marring the same, it is therefore inserted entire, and is as follows (177 U. S. p. 511):

"Counsel also calls our attention to the difference in the procedure in the disposal of agricultural and mineral lands. With respect to the former, all proceedings are carried on in the Land Department, and it is only after the legal title has passed by patent that inquiry is permissible in the courts, while in respect to the latter the aid of the courts is invoked before the issue of a patent and in order to determine, to some extent, the right thereto. Noticing this distinction he also notes the fact that a contest in respect to the validity of a patent for agricultural lands can be litigated in the federal courts, and hence draws the inference that a contest preliminary to a patent for mineral lands, and involving the right thereto, must also be one which can be litigated in the same courts. But we think the true inference from this difference of procedure is to the contrary, because, in respect to agricultural lands, it is settled that all questions of fact are determined by the Land Department, and that after the issue of a patent only questions of law are open for consideration in the courts, and, as the laws of Congress alone determine the matter of the disposal of the public lands, it follows that the questions of law which are thus open for consideration are those arising under the Acts of Congress. While on the other hand, as we have heretofore shown, in these adverse suits preliminary to a patent of mineral lands, not merely questions of law arising under the statutes of the United States, but questions of fact and questions arising under local rules

and customs and State statutes are open for consideration. The scope of the inquiry, which is permissible in the two cases, emphasizes the fact that in the latter case the controversy may be one not arising under the Constitution or laws of Congress."

The foregoing paragraph is quoted from a case, like the other mining cases cited, that involved merely the ascertainment of the right to a patent, and the result does not involve the question here presented. In order to have done so, the right to the patent must have been ascertained and the patent issued under the laws of the United States, fixing definitely its location and boundaries, and any construction of it, removing such location or any of its boundaries so as to reduce the area of the land conveyed, or deprive the grantee of any right incident to it, would have impaired its validity and presented a question over which this court has jurisdiction, and would have been precisely the case at bar.

Thus far only the cases involving immovable survey or boundary lines have been cited, but there is a class of cases involving movable survey or boundary lines on navigable waters, generally with a meander survey line drawn along or near the bank or shore, to which the legal principle deduced from the former cases has special application, and which boundary lines are like the one in the case at bar, and are not confined to the specific calls for monuments on the line surveyed as in said cases, but which in addition involve a construction of the grants of the United States made in pursuance of its laws, in order to determine whether the grants convey title to high or low-water mark, or to the center of the stream, and which present federal questions even if they were not presented in cases of immovable survey lines as boundaries, and this court has continuously, tacitly in some cases, recognized this doctrine. Such are the following cases in this court decided on writs of error to State courts: Railroad Co. v. Schurmeier, 7 Wall. (74 U. S.), 272; Barney v. Keokuk,

94 U. S., 324; Packer v. Bird, 137 U. S., 661; Knight v. U. S. Land Ass., 142 U. S., 161; Shively v. Bowlby, 152 U. S., 1; Grand Rapids and Indiana Rd. Co. v. Butler, 159 U. S., 87, to which is added the case of Hills v. Homton, 4 Sawyer, 195, commenced in a federal court by a citizen of the district in which it was commenced, and the case of Mitchell v. Smale, 140 U. S., 406, removed from a State court to a federal court, both presenting the same question, and all of which were maintained on the ground that they presented federal questions, and jurisdiction in them could not have been maintained on any other ground.

In the cases of Hills v. Homton, 4 Sawyer, 195; Mitchell v. Smale, 140 U. S., 406, 407-410, and Shively v. Bowlby, 152 U. S., 1, 9 (in none of which latter cases was there an island in controversy), the question of jurisdiction was specially discussed, upheld on the ground that a federal question was presented, and in the last case it was held that an attack of a patent, precisely such a one as was made on the patent in the case at bar, sustained by the State court as in the present case, was declared to be

"A direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a federal question within the appellate jurisdiction of this court." (pp. 9–10.)

It is not believed to be possible to distinguish the latter case from the one at bar.

In Packer v. Bird, 137 U. S. 661, the question of jurisdiction is not discussed, but it is stated therein, p. 669, that:

"Whatever rights or incidents attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not inpair the efficiency of the grants or the use and enjoyment of the property by the grantee."

It is the enforcement of this condition that plaintiff is now seeking, and it is respectfully submitted that this

court has jurisdiction to determine whether, as she claims, that condition has been violated by the judgment of the Supreme Court of Missouri herein, and, if so, to reverse the judgment of the latter court.

In the case of Packer v. Bird, 137 U. S., 661, there was an island in the river, and it is further respectfully submitted that this court was misled herein by that fact, but there is no intimation in the opinion in the case that the question of jurisdiction could be raised by, much less turn on, that fact. It was a mere incident in the case that had no bearing on the question of jurisdiction and was not in any of the other cases cited herein dealing with the question of boundaries on navigable waters, except in the cases of Railroad Co. v. Schurmeier, 7 Wall. (74 U. S.), 272, and Grand Rapids and Indiana Rd. Co. v. Butler, 159 U. S., 87. In the former no comment was made on the island, if there was really one formed, and in the latter case it is doubtful whether there was an island in the river at the time of the original United States Survey, but there was one subsequently surveyed, and in delivering the opinion in the case Mr. Chief Justice Fuller quotes approvingly from the opinion of the Supreme Court of Michigan in the case, as follows, 159 U. S., p. 89:

"A large mass of testimony was taken as to the character of this so-called island at the time of the original surveys, and for some years subsequent, the complainant's testimony tending to show that it was at first a low sand bar covered a good part of the year with water, and the defendants tending to show that it was then a well-defined island. It is immaterial to determine what the facts are as to the condition of this land in those early days, for, in our judgment, it was of no consequence whether it was what might be termed 'an island' or 'a sand bar' or 'a piece of low, wet ground.' The law is the same in either case."

The sand bar displayed on the plat of the survey herein (Record, p. 14) is plainly marked on its face, "MISSIS-

SIPPI RIVER," with an arrow showing the course of the river over it, thus demonstrating that it was neither land nor an island, but part of the river bed, and that there was no land between the survey line and the river, and that the river was the boundary of the survey. This plat and survey are absolutely conclusive, and not subject to contradiction in any manner; Bates v. Illinois Central Rd. Co., 1 Black (66 U. S.), 204, 206; Lindsay v. Hawes, 2 Black (67 U. S.), 554,559; Kissell v. Schools, 18 How. (59 U. S.), 19, 25; Jourdan v. Barrett, 4 How. (45 U. S.), 169, 184. And this plat fixed the river as the boundary in this patent beyond dispute; Railroad Co. v. Schurmeier, 7 Wall. (74 U. S.), 272, 276; Hardin v. Jordan, 140 U. S., 371, 373; Jefferis v. East Omaha Land Co., 134 U. S., 178, 194; Grand Rapids & Ind. Rd. Co. v. Butler, 159 U. S., 87, 89; Shelton v. Maupin, 16 Mo., 124, 126-128; St. Paul, etc., Rd. Co. v. First Division, etc., Rd. Co., 26 Minn., 31. But the Supreme Court of Missouri, plaintiff claims, has contradicted this plat in this case, and this contradiction presents a federal question herein.

There is still another class of cases that present all of the features of the ones cited herein on both immovable and movable boundary lines, nd include also the question of riparian rights under United States grants. The premises in controversy in them respectively were alluvial and formed by accretions to the banks of the Mississippi river. Such are the cases of Schools v. Risley, 10 Wall. (77 U.S.), 91, and County of St. Clairv. Lovingston, 23 Wall. (90 U. S.), 46. The first of the latter cases originated in the City of St. Louis, and was heard on writ of error to the Supreme Court of Missouri, in this court, and the second originated immediately across the river from the former and (and both of them are like the one at bar) was heard in this Court on writ of error to the Supreme Court of Illinois. The only question discussed in either of them, by either Counsel or this Court, was that of boundary, but the questions of juris-

diction in this Court, and whether a United States grant bounded on a navigable stream carried with it a right to the alluvion formed by accretions to such grant, were necessarily involved, and decided in the affirmative. It is respectively submitted that neither of them can be distinguished from the case under consideration. To the same effect is the case of Jefferis v. East Omaha Land Co., 134 U. S., 178, a case commenced in a United States Circuit Court, by a citizen of the district of the court, and a judgment for plaintiff affirmed by this court; and also the case of Mitchell v. Smale, 140 U. S., 406, a case removed from a State court, involving a meander line on a lake, under a United States patent, and the right of removal sustained on the ground that a federal question was presented.

But in addition to all of the foregoing, and aside from the question of a meander line or plat, the statements in the patent to Louis Labeaume, or his legal representatives, establish a Spanish concession to him of the land to which the premises sued for are an accretion, in 1799, a survey of the same by Antoine Soulard, Surveyor of the Province, in the same year, a confirmation on September 22, 1810, by commissioners appointed for that purpose, commonly called the "Old Board of Commissioners," to said Louis Labeaume, agreeably to said concession, and that on June 14, 1811, they issued to him a patent certificate numbered 982, for said confirmation (Record, p. 14) (all done in pursuance of the provisions of the treaty of Paris). The patent also contains a copy of said Soulard's Survey, from which it is plainly obvious to the naked eye, that the latter survey and confirmation were bounded on the east by the Mississippi river, and it is so stated to be bounded in said patent. It is further stated therein that accretions had formed to said Soulard's Survey to the extent of about 14 acres at the time United States Survey No. 3,333 was executed, and that they were included in this latter survey, and account in part at least for the excess of land in the latter over the former

survey, and that said accretions appeared to be rapidly advancing (Record, p. 23), and they necessarily called for a construction of this patent in order to determine its boundary line, and presented a federal question.

The rule for the construction of deeds (and which rule applies with equal force to United States patents) announced by Devlin on Deeds (2d Ed.), Sec. 836, p. 1113, Vol. 2, is, that "the rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties and then to give effect to such intention if practicable, when not contrary to law;" Walton v. Drumtra, 152 Mo., 489, 497; Johnson v. Bowlware, 149 Mo., 451, 456; Carter v. Foster, 145 Mo., 383, 392; Presnell v. Hadley, 141 Mo., 187, 191, 194; West v. Bretelle, 115 Mo., 653, 658.

It is respectfully submitted that a federal question is necessarily presented by this required construction of this patent.

Attorneys for defendant insist that neither the construction nor the validity of the patent under consideration was in question in this case, and this court was evidently misled by it. We have already seen from direct decisions of this court that both were involved. The attack on the patent was a direct one by the objections made by them to reading it in evidence on the ground that it was irrelevant and immaterial and not showing plaintiff was a riparian owner, which the trial court overruled (Record, p. 13), but which the Supreme Court of Missouri sustained (Record, p. 295), and thereby invalidated it at least in regard to all that plaintiff claimed under it in this action.

There is no question but what the United States would have owned the legal title to the alluvial formation in dispute (under either the civil, French, Spanish or common law, under which one of them is immaterial, as they are all substantially the same on this question [Smith v. St. Louis Public Schools, 30 Mo., 290, 299), if the patent

under consideration had not been issued (Shively v. Bowlby, 152 U.S., 1, 35), and there is no more question that it conveyed that right if bounded by the river. The latter is plaintiff's claim, denied to her by the decision of the Supreme Court of Missouri, and presents a federal question under the Act of Congress in pursuance of which the patent was issued.

Plaintiff was bound to show a legal title to the premises sued for in order to recover; Kissell v. St. Louis Public Schools, 18 How. (59 U. S.), 19, 21. That is, she could recover only on the strength of her own title, not on the weakness of the defendant's title, and therefore defendant, being in possession of the premises sued for could contest the patent under consideration, and raise all of the questions in regard to it in order to invalidate the same whether defendant made any claim of title adverse to this patent or not, and the attack made on it raised all of the questions specified herein.

It is not deemed necessary to again go over the question, elaborately treated in the "Statement and Brief for Plaintiff in Error on Motion to Dismiss or Affirm" this case, and again cite the long line of cases holding that when a grant of land by a patent is contested, the construction of theAct of Congress under which it was issued, is drawn directly in question, and that a federal question arises in such case under the first clause of Sec. 709, R. S. U S., and need not be specially set up or claimed, and and that when a patent has been read in evidence against objections to its introduction, and a chain of title under it introduced in evidence, with instructions asked in regard to the effect of such patent, all of which was done in the case at bar, the federal right is "specially set up" and "claimed."

This court, however, has placed a construction on the Act of Congress of June 6, 1874, 18 U. S. Stats. at Large, p. 62, relied on in the latter brief, which is believed

to be at variance with its terms, as there is no intimation in this Act that it shall be restricted to confirmations unpatented, but the language used in it is so broad that it covers all confirmations; and this court held in the case of Campbell v. Laclede Gas Light Co., 119 U. S., 445, 446, that where the question was whether an older patent or this Act of Congress passed the legal title to such a confirmation, it presented a federal question under a writ of error to the Supreme Court of Missouri.

This Act of Congress concerned the public lands, and is a public law of which the courts take judicial notice (Pavin v. Ryan, 32 Mo., 21, 24), and the courts are presumed to keep it in mind. The Supreme Court of Missouri, in the case at bar, whether consciously or unconsciously, is immaterial, decided directly against it in a paragraph which is as follows:

"Whatever may have been the original Spanish concession, the survey and patent made under the confirmation, in 1852, must control as to the extent of Labeaume's right." (Record, p. 293.)

It is not necessary that said Act of Congress should have been mentioned, referred to in the record herein, or even thought of, by either the Supreme Court of Missouri, when it made said decision, or any attorney in the case, as the federal question in the case under it was necessarily raised and passed on, and this court has jurisdiction thereof.

In Miller v. Nichols, 4 Wheat. (17 U. S.), 311, 315, the truly learned, able and eminent Mr. Chief Justice Marshall, speaking for the court, said:

"It would not be required that the record should, in terms, state the misconstruction of an Act of Congress, or that an Act of Congress was drawn into question. It would have been sufficent to give this court jurisdiction of this cause, that the record should show that an Act of Congress was applicable to the case."

He reiterates this proposition in somewhat different language, in Hickie v. Starke, 1 Pet. (26 U. S.), 94, 98, and Mr. Justice Story, in Crowell v. Randell, 10 Pet. (35 U. S.), 368, 394, quoted it *verbatim*, with approval, and proceeded to explain it in such manner as to make it precisely applicable to the case at bar, as follows:

"Because upon the statement of facts (statements in the patent herein,) the State court, under these circumstances, must have misconstrued the Act of Congress or disregarded it; for otherwise they would not have given the judgment which was sought to be revised."

All of which is respectfully submitted,

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